

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES BAILEY, as Personal
Representative of the Estate of JANE
BAILEY, deceased, and ROBERT
BAILEY,

Case No: **11-14199-GCS-MAR**
Judge: George Caram Steeh
Magistrate R. Steven Whalen

Plaintiffs,

-vs-

NYLONCRAFT, INC.,

MOTION TO DETERMINE
LIEN FILED BY SOMMERS
SCHWARTZ, P.C.

Defendant.

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**MOTION TO DETERMINE LIEN FILED BY SOMMERS SCHWARTZ, P.C. MOTION
BRIEF IN SUPPORT OF MOTION TO DETERMINE LIEN FILED BY SOMMERS
SCHWARTZ, P.C.**

EXHIBITS

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Dated: December 7, 2012

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JAMES BAILEY, as Personal
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Defendant.

MOTION TO DETERMINE LIEN FILED BY SOMMERS SCHWARTZ, P.C.

ROBERT H. DARLING, through his counsel, moves this Honorable Court to enter an Order determining or extinguishing the lien filed by Sommers, Schwartz, P.C. In support of this Motion, movant states that:

1. This is a wrongful death case in which Plaintiffs, James Bailey, the Personal Representative of the Estate of Jane Bailey, and Robert Bailey, have been represented by attorneys Francis M. Fitzgerald and Robert H. Darling.
2. The parties to this suit have reached a tentative settlement, subject to Court approval.
3. A Motion to Approve Settlement has been filed, and is currently before the Court, with confidential documentation of the settlement amount and the attorney fee distributions called for in the fee contract between Plaintiffs and their counsel.
4. If the Court approves the settlement as anticipated, a portion of the settlement

funds will be payable to Robert H. Darling for his services.

5. Mr. Darling was formerly a shareholder and employee of Sommers, Schwartz, P.C., and a small portion of the work done by him on this Bailey case was performed while a shareholder at Sommers, Schwartz.

6. No other Sommers, Schwartz attorney worked on this Bailey case.

7. Sommers, Schwartz has now filed a “lien” on the Bailey settlement proceeds, but has failed to identify the amount which it claims.

8. The “lien” filed by Sommers, Schwartz threatens to complicate, delay, or prevent effectuation of the settlement and distribution of settlement proceeds to the Plaintiffs and Mr. Fitzgerald, as well as to Mr. Darling.

9. In an effort to resolve the Sommers, Schwartz lien claim without requiring the Court’s involvement, Mr. Darling has provided Sommers, Schwartz with the opportunity to review and copy the Bailey file, has provided an itemized listing of the time spent by him on the Bailey file before his departure from Sommers, Schwartz—67.2 hours, of which 23.4 played a significant role in the outcome—as well as the time spent by him on the case after his departure—328.4 hours, of which 225.5 contributed significantly to the outcome (attached Ex. 1).

10. Mr. Darling has also provided to Sommers, Schwartz the Affidavit of co-counsel, Mr. Fitzgerald, confirming that the vast majority of the work done by Mr. Darling was performed after leaving the Sommers, Schwartz firm (Ex. 2).

11. As Mr. Darling and Sommers, Schwartz have been unable to agree upon the

amount to which Sommers, Schwartz may be entitled, Darling now asks this Court to determine the amount of the Sommers, Schwartz lien and, if the settlement is approved, to authorize distribution of the settlement proceeds accordingly.

12. Plaintiff respectfully requests that this Court enter an order determining Sommers, Schwartz lien. A proposed order is attached as Ex. 3.

13. Pursuant to L.R. 7.1, Mr. Darling's counsel sought Defendant's concurrence in this motion and concurrence was denied.

RESPECTULLY SUBMITTED,

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ISSUES PRESENTED

1. Should The Court Determine The Sommers, Schwartz Lien?

Most Significant Cases

Ambrose v The Detroit Edison Company,
65 Mich App 484 (1975)

Ecclestone v Ogne,
177 Mich App 74 (1989)

Smith v Khouri,
481 Mich 519 (2008)

Medbury v General Motors,
119 Mich App 351 (1982)

Polen v Melonakas,
222 Mich App 20 (1997)

STATEMENT OF FACTS

The underlying facts are explained in the Motion in support of which this Brief is filed. Simply put, the Sommers, Schwartz firm has asserted a lien, in an unspecified amount, for work done on the case by Mr. Darling before his departure on June 14, 2012. This Motion asks the Court to determine the amount of the Sommers, Schwartz lien.

ARGUMENT

I. THE COURT SHOULD DETERMINE THE AMOUNT OF THE SOMMERS, SCHWARTZ LIEN

Hearing on the Motion to Approve Settlement is set for this upcoming Wednesday, December 12th. It is anticipated that the Court will grant that motion. If so, Mr. Darling will receive a fee for his services on behalf of Plaintiff. In order to finalize resolution, he asks the Court to determine and extinguish, upon payment, the Sommers, Schwartz lien.

The basic format is not unusual: an attorney replaced during the course of the case, or a law firm which employed a departing attorney for part of the work. That entity is concededly entitled to a “quantum meruit” recovery—literally “what it is worth”. Ambrose v The Detroit Edison Co, 65 Mich App 484, 491 (1975) (withdrawing attorney) (“...an attorney who...rightfully withdraws is entitled to compensation for the reasonable value of his services based upon quantum meruit and not the contingent fee contract”); Ecclestone v Ogne, 177 Mich App 74, 76 (1989) (attorney leaving firm).

The factors comprising a “reasonable fee” are spelled out in **MRPC 1.5(a)** and cases such as Wood v DAIE, 473 Mich 573 (1982); Crawley v Schick, 48 Mich App 728, 737 (1973); and Smith v Khouri, 481 Mich 519 (2008). In Smith, the Supreme Court explained the appropriate process (481 Mich at 522):

“We take the opportunity to clarify that the trial court should begin the process of calculating a reasonable attorney fee by determining factor 3 under **MRPC 1.5(a)**, i.e., the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence. This number should be multiplied by the reasonable number of hours expended. This will lead to a more objective

analysis. After this, the court may consider making adjustments up or down in light of the other factors listed in Wood and MRPC 1.5(a).”

The same formula—number of hours times hourly rate—is used in the quantum meruit setting of this case. Medbury v General Motors, 119 Mich App 351, 354-355 (1982) (quantum meruit for discharged attorney calculated by multiplying number of hours by hourly rate); Ecclestone, 177 Mich App at 76 (same calculation for law firm claim). As the Court of Appeals observed in Polen v Melonokas, 222 Mich App 20, 28 (1997):

“quantum meruit is generally determined by simply multiplying the number of hours worked by a reasonable hourly fee.”

An itemized breakdown (Motion Ex. 1) shows that, while at the Sommers, Schwartz firm, Mr. Darling worked a total of 67.2 hours, most of which were largely ministerial. The Court can select an appropriate hourly rate for Mr. Darling’s services on the case while at Sommers, Schwartz. By multiplying the two, the Court can determine an appropriate “quantum meruit” recovery for Sommers, Schwartz, determining the amount of the lien and concluding the Bailey case in full.

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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